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In The

Supreme Court of the United States

October Term, 1991

JEAN O. TURNER, TRUSTEE,

Cross-Petitioner,

vs.

GREGORY J. AVERY and KATHLEEN R. AVERY,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

What is the burden of proof for a Chapter 7 trustee in a turnover action relative to contingent fee contracts of a terminated law partnership, continued to be serviced by the debtor attorney?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Statement of Jurisdiction 2

Statutes Involved 2

Statement of the Case 10

Reasons for Granting the Writ 12

I. A Federal Question Decided in Conflict With a State Court of Last Resort 12

II. National Impact 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Due v. Due, 342 So. 2d 161 (La. 1977) 13

Grogan v. Garner, 111 S. Ct. 654 (1991) 14

Contents

Page

In re Cooley, 87 B.R. 432 11

In re Farmer's Markets, 752 F.2d 1400 (9th Cir. 1986) 12

In re Goodson Steel Corporation, 488 F.2d 776 (5th Cir. 1974) 14

In re Tonry, 724 F.2d 467 (5th Cir. 1984) 11

Saucier v. Hayes Dairy Products, Inc., 373 So. 2d 102 (La. 1979) 12, 13

Statutes Cited:

11 U.S.C. § 541 5

11 U.S.C. § 542 8

28 U.S.C. § 1254(1) 2

Louisiana Civil Code:

Article 2828 2

Article 2834 3

Article 2835 5

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jean O. Turner, Trustee, respectfully submits this cross-petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The November 27, 1991 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 947 F.2d 772 (5th

Cir. 1991). This opinion, together with the unreported decisions of the United States District Court for the Eastern District of Louisiana and of the United States Bankruptcy Court for the Eastern District of Louisiana are reprinted in Appendices A, B, and C, of the Petition for Writ of Certiorari filed on behalf of Gregory J. Avery and Kathleen R. Avery (No. 1559).

STATEMENT OF JURISDICTION

The opinion and the judgment of the United States Court of Appeals for the Fifth Circuit were entered on November 27, 1991. On December 26, 1991, the Fifth Circuit denied petitions for rehearing filed by both original petitioners and cross-petitioner. On March 25, 1992, cross-petitioner was served with the Petition for Writ of Certiorari filed on behalf of Gregory J. and Kathleen R. Avery.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Art. 2828. Continuation for liquidation; sole proprietorship

When a partnership terminates, the business of the partnership ends except for purposes of liquidation.

If a partnership terminates because its membership is reduced to one person, that person is not bound to liquidate the partnership and may continue the business as a sole proprietor. If the person elects to continue the business, his former partners are entitled to amounts equal to the value of their shares as of time the partnership terminated, and they have the right to demand security for the payment of partnership debts.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) This article provides that when one of the causes of termination occurs, the business of the partnership continues, but only for purposes of liquidation.

(b) The article further provides that when there is only one remaining person, the person may elect to continue the business.

In case the business is continued, former partners may demand security for the payment of the debts of the partnership. Since the withdrawing partners have virile share liability for debts incurred prior to withdrawal, they are accordingly given rights to demand security for the payment of those debts.

(c) If membership is reduced to one person, the former partners cannot compel liquidation if the sole ground for doing so is that the partnership has terminated because of the reduction; however, if there is some other ground for liquidation, such as the inability of the remaining person to furnish the required security, the remaining person can be forced to liquidate the business.

C.C. art. 2832 et seq.

Art. 2834. Liquidation of the partnership

In the absence of contrary agreement, a partnership is liquidated in the same manner and according to the same rules that govern the liquidation of corporations.

A partnership retains its juridical personality for the purpose of liquidation.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) Retaining the juridical personality of the partnership facilitates the process of liquidation and insures that the fiduciary relationship between the partners and the partnership continues until final liquidation. Retaining juridical personality also allows the liquidator to act on behalf of the partnership to recover assets and permits the creditors to institute proceedings against the partnership itself.

(b) The contract of partnership may provide for the appointment of liquidators and may set the manner and method of liquidation. For example, the partners may appoint one or more partners, one or more third persons, or a combination of partners and third persons, to serve as liquidators. This article applies only in the absence of a pertinent stipulation.

(c) Once a cause of termination occurs, the partnership is required to liquidate, unless it is continued as provided in Articles 2827 and 2828, *supra*. If the partnership does not liquidate after a cause of termination has occurred, any interested party may seek a court order directing liquidation and a judicial appointment of a liquidator. An "interested party" includes a partner, a third party creditor, an heir or assign of a partner, or any one who has a legitimate interest in the liquidation of the partnership. If the interested party has good reason for demanding liquidation, he may force liquidation even in case the partnership or the business has been continued as provided in Articles 2827 and 2828, *supra*.

R.S. 12:53, 12:141 et seq.

Art. 2835. Final liquidation

The liquidation of a partnership is not final until all its assets have been collected and applied to its obligations and its remaining assets, if any, have been appropriately distributed to the partners.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) This article insures that the relationship of partners to the partnership, including their fiduciary relationship, does not end fully until final liquidation has occurred. A partner's obligation to the partnership continues with regard to those matters to be carried out in the liquidation process. This is consistent with the rule that the juridical personality of the partnership continues until final liquidation; consequently there is an attendant fiduciary duty of partners not to interfere with the orderly liquidation of the partnership.

(b) This article confers power and authority on the liquidator to handle the liquidation process until the assets of the partnership have been collected, the obligations of the partnership have been satisfied, and the remaining assets, if any, have been distributed.

C.C. art. 2834.

SECTION 541 (11 U.S.C. § 541)

§ 541. Property of the estate.

(a) The commencement of a case under sections 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case; or

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution.

(c)(1) Exept as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agrement, transfer instrument,

or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

SECTION 542 (11 U.S.C. § 542)

§ 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor

may exempt under section 522 of this title, shall deliver trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property

or financial affairs, to to [sic] turn over or disclose such recorded information to the trustee.

STATEMENT OF THE CASE

On May 22, 1985, debtors, Gregory J. and Kathleen R. Avery, filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Within the schedules of bankruptcy, namely Schedule B-2, Section "u" the debtors listed a one-half (½) interest in Orill & Avery, law partnership, which interest was valued by the debtors at zero. The duly appointed and qualified trustee commenced investigation, individually and through counsel, as to the value of the debtors' interest in the terminated law partnership, which culminated into an adversary proceeding entitled Complaint for Turnover of Value of Partnership filed on January 12, 1987. On June 5 and August 18, 1989, trial on the merits was held and a judgment was signed on January 29, 1990, by the United States Bankruptcy Court, Eastern District of Louisiana. Thereafter, a notice of appeal was filed by debtors to the United States District Court, as a court of review, which affirmed the judgment, as amended, of the Bankruptcy Court. Debtors filed a new notice of appeal to the United States Court of Appeals, Fifth Circuit, which rendered its decision on the 27th day of November, 1991, reversing the judgments of the United States District Court and the Bankruptcy Court and remanding the case to the United States Bankruptcy Court for further hearings commensurate with its opinion. Petitions for Rehearing were filed by appellant and appellee, which were denied.

Trustee asserted that the contingent fee contracts of a terminated law partnership always were owned and possessed by said partnership. As such, the debtor's percentage interest belongs to the bankruptcy estate, after liquidation of all assets (contingent fee contracts).

Trustee proved the debtor's ownership was property of the estate. From there, a benchbook was compiled identifying the case number, name of client, the amount received, costs incurred and the fee charged. These figures were for completed cases through 1987.

The Bankruptcy Court found that executory contracts (contingent fee contracts) did not belong to the debtor's estate; *In re Tonry,*[1] was distinguishable; the debtor (bankruptcy estate) owned in indivision the residuum of the liquidated law partnership; the fees and costs received on old partnership cases belong to the partnership and equitably flow into the debtor's bankruptcy estate. (*See In re Cooley,* 87 B.R. 432, 444); the right of offset for work and expenses performed post filing of bankruptcy was inconclusive for lack of any evidence to prove same. On review by the United States District Court, the decision of the Bankruptcy Court was affirmed.

However, on appeal, the Court of Appeals, Fifth Circuit, rejected the decisions of the lower court. Finding that *Tonry* controlled, the Court of Appeals vacated the original and amended judgments in favor of your petitioner (trustee), remanding same for further evidence. In its opinion, the Court of Appeals isolated the issue of burden of proof, requiring the trustee to carry the entire burden of valuing the whole of the contingent fee contracts handled by the debtor both pre-petition and post-petition in bankruptcy, in order to demonstrate the value of said contracts belonging to the bankruptcy estate.

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1. *In re Tonry,* 724 F.2d 467, 468-469 (5th Cir. 1984).

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL QUESTION DECIDED IN CONFLICT WITH A STATE COURT OF LAST RESORT.

Determination of property of the estate is wholly a federal question. The determination of the extent and value of said property is controlled by state law. *In re Farmer's Markets*, 752 F.2d 1400, 1402 (9th Cir. 1986).

Louisiana, in deciding the quantification of legal services performed on behalf of a client, has stated in the case of *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1979), rehearing June 25, 1979, to wit:

> Considering the peculiar nature of the contingency fee contract, its social importance, and its potential for abuse as well, in light of our duty to enforce the Disciplinary Rules, we conclude that only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed. Further, that fee should in turn be allocated between or among the various attorneys involved in handling the claim in question, such fee apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility.

* * *

> The second attorney, along with the first attorney, will then be accorded the opportunity to establish his right to receive an appropriate apportionment of the one contingent fee owed by Mr. Saucier for legal services rendered in connection with his claim.

See also, Due v. Due, 342 So. 2d 161 (La. 1977), *rehearing denied,* February 25, 1977. In the *Due* decision, factually analogous since the ex-wife was incapable of performing the contingent fee contracts, the Louisiana Supreme Court expressed, in footnote four, the following:

> If the husband (being unable to sell or to assign his interest in the fee to his wife) is entitled to retain the interest in the contingent fee contract acquired during the community, he might be required to account to the community in the partition of its assets for the value of its interest in the contract at the date of the community's dissolution. A comparable procedure is followed in the partition of successions, where an heir desires to retain instead of return property subject to collation. Articles 1333, 1356, 1359.

The United States Court of Appeals, Fifth Circuit, has declared that the trustee's burden of proof necessary for recovery is "to prove the value of the legal services provided in each case prior to the date of the filing of the bankruptcy petition." This is not only burdensome and onerous, but in direct conflict to the *Due v. Due* and *Saucier v. Hayes* cases cited *supra.* Practically speaking, the Court of Appeals has ignored state law, requiring your trustee and all others who may be faced with the same circumstances to prove both the estate's interest, and the proportionate interest deserving to the debtor also. To reach the value belonging to the bankruptcy estate, the whole case must

be researched, reviewed, reconstructed, and measured as of a certain date.[2] Additionally, the United State Court of Appeals erred in using the citation of *In re Goodson Steel Corporation,* 488 F.2d 776 (5th Cir. 1974) as a barometer of the burden of proof. *See Grogan v. Garner,* 111 S. Ct. 654 (1991), which states:

> Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless "particularly important individual interests or rights are at stake." *Herman & MacLean v. Huddleston,* 459 U.S. 375, 389-390, 103 S.Ct. 683, 691, 74 L.Ed.2d 548 (1983); see also *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979).

II.

NATIONAL IMPACT

Lawyers are, for the most part, litigious by nature. Debtors who are lawyers are worst. The delicate issue of ownership of attorney's fees and costs, partially completed and fully collected post filing, in a setting other than as an individual practitioner, is troublesome, at best. Contingent fee contracts have spurned personal injury litigation for years. As a greater number of lawyers are admitted to the bar nationwide, the problem appearing in this case will mushroom. More and more conflicts between a trustee and a debtor/attorney will surface in the Bankruptcy Courts, United States District Courts and the Courts of Appeals,

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2. Debtor has always maintained custody of all contingent fee cases completed by him.

to determine the ownership interest of contingent fee contracts in the clash between the bankruptcy estate and the debtor, individually. Guidance to trustees, debtors, attorneys for both and courts is essential for all concerned. From a public policy viewpoint, the issue illuminated herein highlights a tarnishment of the legal profession. Bankrupt lawyers who receive a discharge of his or her debts and soon thereafter settle and/or compromise a personal injury case for hundreds of thousands of dollars is most distressing to the discharged creditors and a constant source of criticism.

CONCLUSION

Trustees, in turnover actions, have the burden of proof to establish that the asset is property of the estate and the value thereof, if incapable of production. State law establishes property rights, value and/or damages sustained.

The errors of the Court of Appeals, Fifth Circuit, should be corrected and a pathway established for trustees to follow in the future handling of cases of this nature.

WHEREFORE, petitioner respectfully prays that a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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